IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

SUB-REGISTRY OF MWANZA

AT MWANZA

CRIMINAL APPEAL NO. 7226 OF 2024

(Arising from the Criminal Revision No. 3721/2024 Ilemela District Court at Buswelu Hon.s Kubaja whose Original Criminal Case No. 1319/2023 in the Primary Court of Ilemela)

ERICK MATEO MTUA..APPELLANT

VERSUS

WILBARD KALINJUMA.. RESPONDENT

JUDGMENT

11th June &2nd July 2024

CHUMA, J.

The appellant Erick Mateo Mtua is challenging the decision of the District Court of Ilemela sitting at Ilemela in Misc. Criminal Revision No 3721/2024, having its origin in Ilemela Primary Court in Criminal Case No 1319/2023. A brief account of the case as can be gleaned from the record of appeal is as follows;

The respondent was charged before the Primary Court of Ilemela at Ilemela with an offence of criminal trespass contrary to section 299(b) of the Penal Code Cap 16 R.E 2019. The proceedings before the Primary Court were heard ex-parte. After the hearing, the trial Court convicted the respondent as charged. Subsequently, he was sentenced to six months imprisonment.

Further to that, the respondent was ordered to be evicted, from the house he was alleged to trespass. If that is not enough, the trial Court appointed the court broker to effect the eviction. Being aggrieved with the decision of the trial Court, the respondent preferred a revisional application before the District Court of Ilemela sitting at Ilemela, which is the subject of this appeal.

Before the District Court, the respondent prayed for among others the following reliefs; an order freeing him on bail, pending the determination of the revisional proceedings, the suspension of the sentence pending the determination of the revisional proceedings, that, the District Court to call and examine the records and proceedings and judgment of Ilemela primary court in Criminal Case No 1319 of 2023, for purpose of satisfying itself as to the correctness, legality, propriety, and regularity of the proceeding, order for the acquittal the respondent, and any other relief the court could deem fit and just to grant.

Having heard the submission by the parties, the District Court found that, the respondent was never arraigned in court and told the nature of the charge put to him because the court heard the case and eventually convicted and sentenced in his absence. In reaching that decision, the District Court

referred to Section 31 of the Third Schedule to the Magistrate Courts Act, Cap 11 RE 2019.

The District Court went on to reiterate that the cited provision above is a replica of Section 228(1) and 2) of the Criminal Procedure Act. He relied on the decision in the case of **Naoche Ole Mbile V. Republic** (1993) TLR 253 where the Court made an observation that

> *"The requirement of arraignment of an accused person as embodied in those provisions is mandatory and non-compliance therewith renders the proceedings a nullity. The rationale for this is not difficult to find, it is that the accused must know the offence with which he is charged and for which he is being tried. A person should not be put in jeopardy of a conviction when he is unaware of the source of such jeopardy itself. The necessary corollary that follows from this is that the accused must be physically present and the charge must be put to him in person".*

The District Court went on to find that since the respondent was never arraigned in court to face the charge all that went on in court, was nullity subject to be revised.

On the other hand, the District Court went on to find that, by the nature of the matter which was instituted before the Primary Court, the appellant was precluded from instituting a criminal case, rather he ought to have instituted a civil case. Referring to the decision of this Court in the case of **Erick Mateo Mutua V. Wilberd Kalimnjuma** Land Appeal No 29/2023 HCT at Mwanza, the trial Court asked the parties, if they desire to pursue their rights according to the law and procedures. The District Court also criticized how the trial Court involved itself in appointing the Court broker to effect the Court's order to evict the respondent. The District Court found that the order was irritation one and prematurely granted. In the end, the District Court went on to quash the proceedings and judgment of the trial Court dated 11/01/2024.

It is against the said backdrop, that the appellant has preferred the present appeal. In his appeal, he has fronted only two grounds of appeal to wit;

1. *That, the Revision Court erred in law by determining the Criminal Revision no. 3721 of 2024 while the Respondent preferred the Revision as an alternative to his right to appeal.*

2. *That, the Revision Court erred in law to allow the Revision to proceed while the same was an abuse of the court's process.*

At the hearing of this appeal, the appellant was represented by Mr.Silas John Advocate, while Mr. Ditrick, advocate represented the respondent. In his submission in respect of the first ground of appeal, Mr. Silas John submitted that the general rule is that the revision power cannot be exercised if there is a right to appeal. He cited the case of **Moses Mwakibete vs. the editor Uhuru Shirika la Magazeti ya Chama and National Printing Company Ltd** (1995) TLR 134. He also submitted that since the respondent in this case had a right to appeal, as there was no judicial decision blocking the right of appeal, it was wrong for her to apply for revision. Therefore, according to the appellant, the revision was used as an alternative to the appeal. Relying on the case of **Paaris Vs Jeffe and two others** (1996) TLR 116, the counsel for the appellant reiterated that where there are available remedies they must be exhausted before going to another remedy like revision. He, therefore, prayed that this ground be allowed.

In respect of the second ground, Mr. Silas was of the view that if a party uses revision as an alternative to appeal that is an abuse of court process. Citing the case of **Star Peco Ltd and others Vs Azania Bank Ltd and another** Misc. Commercial Application No.11 of 2020, the counsel for the appellant submitted that improper use of judicial process by a party in litigation interferes with the administration of justice.

On the other hand, Mr. Ditrick who vigorously opposed the appellant's propositions, submitted that, Since the trial primary court entertained the case and convicted the respondent in his absence hence it was heard ex-parte. The respondent had two options or remedies: either set aside an ex-parte judgment or file a revision application against such decision and the respondent opted to file revision for the District Court to satisfy itself as to the correctness or illegality of trial court proceedings. The very application was lodged under section 22(1) (2) and section 24(1) (a) (i) and (ii) of MCA cap 11 RE 2019 which empowers the District Court to revise the decision of the Primary Court.

The issue to be answered from the two grounds raised by the appellant above in line with the submission made by the parties herein is whether a

party to criminal proceedings can apply, as a matter of right, for revision in court. The law regulating application for revision and Appeal for matters originating from the Primary Court is; The Judicature and Application of Laws (Criminal Appeals and Revisions in Proceedings Originating from Primary Courts) Government Notice No. 390 published on 14/5/2021. However, the law is silent if an applicant may prefer an application for revision irrespective of the right to appeal. In my opinion, in the absence of a clear position on that, the Court can infer the provision of the Magistrate Court Act and the Criminal Procedure Act Cap 20.

My interpretation of section 44(1) of the Magistrates Courts Act, 1984; Sections 372 and 373 of the Criminal Procedure Act, Cap 20 R.E 2002 is that those provisions do not confer, as a matter of right, a party to criminal proceedings to apply for revision. In terms of Section 359(1) of the Criminal Procedure Act, the respondent was supposed to file an appeal instead of filing a revision application. I am of the considered opinion that the appellant followed the wrong track in submitting his grievances before the District Court.

In the event, I am of the settled view that the respondent's move to file a revision application instead of an appeal before the District Court was a misconceived idea, and improper. He was supposed to file an appeal.

However, because of the said infractions, normally having ruled that the application before the District Court was incompetent I would have proceeded to strike it out. However, given what will be unveiled in due course I shall refrain from following that path for a purpose and to remain seized with the record of the Primary Court to intervene by way of revision and rectify the revised illegalities prevalent in the proceedings and the Tribunal will remain intact perpetuating the illegalities. This approach was followed by the Court in the case of **Chama cha walimu Tanzania vs The Attorney General,** Civil Application No. 151 of 2008, and **The D.P.P Vs. Elizabeth Michael Kimemeta @ Lulu** Criminal Application No. 6 of 2012.

In the latter case, apart from making a finding that the application for revision was not competent, the Court of Appeal did not strike out the application to address the illegality on the face of the record of the High Court having Court emphasized as follows:

> *"So, it is the practice now that, if it is shown that the Court was not properly moved so as the Court to*

exercise its powers of revision under section 4(2) of the Appellate Jurisdiction Act, Cap 141 R.E 2002, hence the proceedings are incompetent but on the face of the record it shows the same to have been tainted with illegality, the Court will not normally strike out that incompetent application. Instead, the Court will be taken to have called the record and proceed to revise the proceedings under section 4 (3) of the Appellate Jurisdiction Act, Cap 141 R.E. 2002..."

Ultimately, the Court went on and held that:

"We did so for a purpose. The purpose is that we remain seized with the High Court's record to enable us to intervene on our own to revise the illegalities pointed out by invoking section 4(3) of the Appellate Jurisdiction Act CAP 141 RE. 2002, otherwise the High Court record will remain intact."

It is clear, in the above case that, the Court of Appeal was confronted with a akin situation. It was observed that the applications for revision though incompetent, emanated from illegal proceedings of the High Court, and thus, striking them out on the ground of incompetency would be tantamount to perpetuating illegalities.

In the case at hand, it is clear as noted by the District Court that the respondent was never arraigned in court to face the charge-and the court went ahead to hear the matter in his absence. This was in contravention of the fundamental principles of natural justice. In addition, as the District Court remarked, by the nature of the dispute between the appellant and the respondent herein, the matter instituted before the Primary Court by the appellant herein, the appellant was precluded from instituting a criminal case, and rather he ought to have instituted a civil case. It was also wrong for the Primary Court to appoint the Court broker who could necessitate the eviction of the respondent from the suit property even without hearing the other party.

Under the circumstances pointed out above, even though the revision application before the District Court was not a proper remedy for the respondent, which would result in it being stricken out, striking it out on the grounds of incompetence will mean that the illegal proceedings of the Primary Court will remain intact and would be perpetuating the illegalities. This is because the said proceedings did emanate from illegal proceedings of the Primary Court. See also the case of **Nundu Omari Rashid vs the**

Returning Officer Tanga Constituency and Two Others, Civil Application No. 3 of 2016.

On the way forward, I invoke my revisional jurisdiction under the provisions of section 31 of the MCA to nullify the proceedings and judgments of the Primary Court. The appellant should follow the proper law and procedure if he so wishes to recover the alleged trespassed land. The appeal is then allowed as discussed above.

DATED at **MWANZA** this 2nd day of July 2024.

W.M. CHUMA

JUDGE

Judgment delivered virtually before Mr.Silas John advocate for appellant and Mr.Ditrick Ishebairo advocate for the respondent this 2nd day of July 2024.

W.M.CHUMA

JUDGE